

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 98-584

April 5, 1999

MAINE PUBLIC SERVICE COMPANY  
Petition for Sale of Generating Assets

ORDER APPROVING SALE  
OF ASSETS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

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**I. SUMMARY**

We approve the sale of generation assets from Maine Public Service Company (MPS, or the Company) to WPS Power Development, Inc. (WPS). We find and certify that the generation facilities to be sold to WPS should be granted Exempt Wholesale Generator (EWG) status by the Federal Energy Regulatory Commission (FERC). We also find that Maine law grants to MPS, or its predecessors, rights, privileges or immunities that are generation assets required to be divested by section 3204.

**II. BACKGROUND**

As a condition of restructuring, electric utilities must, with limited exceptions, divest all generation assets and all generation-related business activities by March 1, 2000. 35-A M.R.S.A. § 3204(1). For MPS, the limited exceptions constitute a significant portion of its generation assets. The limited exceptions include contracts with qualifying facilities (QFs) (section 3204(1)(A)) and ownership of facilities located outside the United States (section 3204(1)(C)). Thus, MPS is not obligated to divest its contractual entitlement to the output of the 18.1 MW biomass plant owned by Wheelabrator-Sherman Energy Company or the 34.5 MW Tinker Station which includes 33.5 MW of hydro-electric capacity and 1MW of diesel capacity.<sup>1</sup>

MPS must divest in accordance with a plan approved by the Commission. MPS hired Stone and Webster Management Consultants, Inc. to assist the Company in its sale efforts. MPS and Stone and Webster developed an auction or bid process. The auction included the opportunity to purchase all MPS generation assets, including the Tinker Station and the contractual entitlement to the output of the Wheelabrator Sherman QF Plant. By Order dated February 20, 1998, the Commission approved the divestiture plan developed by MPS with the assistance of Stone and Webster. *Maine Public Service Company*, Docket No. 97-670 (Feb. 20, 1998).

On July 7, 1998, MPS selected WPS Power Development, Inc. (WPS) as the winning bidder for most of the assets offered. MPS and WPS entered into an Asset

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<sup>1</sup> Pursuant to 35-A M.R.S.A. § 3204(4), MPS is required to sell periodically the rights to the capacity and energy from the generation assets not divested. See also, chapter 307 of the Commission's Rules.

Purchase Agreement (APA) whereby MPS agreed to transfer to WPS the following generation assets:

1. The Millinocket Lake Storage Dam;
2. The Squa Pan Dam, including storage and generating capacity;
3. The Caribou Generating Station;
4. The Flo's Inn Generating Station and the Houlton Generating Station (diesel units);
5. The Tinker Generating Station and associated transmission, owned and operated by Maine and New Brunswick Electrical Power Company, Limited (M&NB), a wholly-owned subsidiary of MPS; and
6. MPS's 3.3455% interest in the Wyman Unit #4, oil-fired plant in Yarmouth, Maine.

MPS and WPS executed the following additional agreements which are referenced in the APA:

1. A Buy-back Agreement, pursuant to which MPS will buy back from WPS the output of the assets being purchased by WPS from the date of closing to March 1, 2000;
2. Two Interconnection Agreements, one each for the U.S. and Canadian assets being sold; and
3. A Continuing Site Agreement for certain of the assets being sold.

MPS rejected all bids for the contractual entitlement to the output of the Wheelabrator-Sherman plant. Because 35-A M.R.S.A. § 3204(1) does not require the divestiture of the Wheelabrator-Sherman contract, the proposed sale to WPS constitutes the complete divestiture required by law.

On August 7, 1998, MPS filed a petition seeking authorization to sell its generation assets to WPS. MPS's filing includes both confidential and non-confidential testimony on the auction process and the details of the sale, as well as the APA, and the buy-back and other agreements between MPS and WPS. After providing notice and opportunity to intervene, the Examiner granted the petitions to intervene of the Public Advocate (OPA), Houlton Water Company (HWC), and the late-filed petition on behalf of McCain Foods, Inc. (McCain).

In its February 20, 1998 Order approving MPS's divestiture plan, the Commission noted that the lack of any direct electrical connection between MPS and the rest of New England presented unique market power issues that might inhibit the development of an adequate competitive retail market for electricity in northern Maine. The Commission directed MPS to address the market power issues when it filed for authorization to sell its generation assets. In its prefiled testimony, MPS presents evidence and argument as to why the Company's indirect interconnection to New England through New Brunswick and the MEPCO line, and Canadian sources of supply to MPS through New Brunswick, should allow the development of an adequate retail competitive market for electricity in northern Maine.

Intervenor testimony was prefiled by the OPA and HWC. HWC presented testimony that northern Maine's interconnection to New England through New Brunswick does jeopardize the development of an adequate retail competitive retail market and recommended that MPS not be allowed to divest itself of its generation assets until the necessary conditions for retail competition have been undertaken. The OPA presented testimony that, under certain theoretical conditions, owners of generation could manipulate and possibly exert undue control over prices in the market not only in northern Maine, but potentially elsewhere in New England. The OPA's witness recommended that the asset transfer to WPS be approved but that WPS be required to bid for standard offer service at "truly competitive market prices." This recommendation would be implemented either by requiring WPS to extend the terms of the buy-back agreement with MPS beyond February, 2000 or by capping generation prices at the long run marginal cost of new market entry.

On December 10, 1998, the Examiner issued a report prepared by the Commission's consultant that served as the bench analysis. The consultant found that the proposed sale to WPS created ratepayer benefits. However, the consultant raised certain issues about MPS's analysis in choosing the WPS bid. The issues concerned whether: 1) MPS needed to or should retain its diesel units for voltage support; 2) WPS's bid for Wyman 4 was comparable to other recent Wyman 4 bids; and 3) MPS erred by using embedded costs for values of plants not sold when developing bid comparison analysis.

MPS responded to the intervenor testimony and bench analysis in prefiled rebuttal testimony on January 20, 1999.

No intervenor filed testimony or raised issues at hearing or in briefs concerning MPS's auction process or MPS's selection of WPS as the winning bidder. It thus appears that the intervenors do not object to a finding that MPS pursued all reasonable means to reduce its potential stranded costs by the conduct of its auction and the sale of the generating assets to WPS.

### **III. DISCUSSION**

We have reviewed the evidence and issues raised in the bench analysis concerning the auction process and MPS's decisions during that process. We agree with MPS's assertion that the diesel units are not necessary for T&D efficiency reasons. We accept MPS's explanation in its rebuttal testimony as to the reasonableness of the value received for its share of Wyman #4.<sup>2</sup>

Concerning the use of embedded costs in its bid comparison analysis, MPS admits, at least in part, that such use led to inaccurate comparisons. There is, however, disagreement about the measure of that inaccuracy. Based on the bench analysis, the inaccuracy could result in another bidder's bid for MPS's hydro assets being worth about \$300,000 more than WPS's bid for the assets. However, even accepting the validity of the bench analysis calculation, the additional costs of a second auction and closing that would be necessary for the non-hydro assets would likely approach or exceed the \$300,000 and thus eliminate any additional value from choosing the other bidder. We will thus approve MPS's choice to sell to WPS and find that MPS reasonably acted to reduce its potential stranded cost by its auction and choice of WPS as the winning bidder.

Much of the market power focus in this proceeding has arisen from two reports prepared on behalf of the Commission for the Joint Standing Committee on Utilities and Energy of the Maine Legislature. The Legislature directed the Commission to conduct a study "to determine the most effective and efficient means" that customers of Maine utilities not directly connected to the New England electric grid "are able to take full advantage of retail access." 35-A M.R.S.A. § 3206(3). This report, entitled: *Competition and Market Power in the Northern Maine Electricity Market*, prepared for the Commission by Tim Woolf and Bruce Biewald, Synapse Energy Economics, and Duncan Glover, Experiment Failure Analysis, was submitted to the Committee on December 1, 1998 and was made part of the record in this proceeding.

The effect of market power on the development of the competitive retail electric market in northern Maine was comprehensively reviewed in the joint Commission and Attorney General *Final Report on a Study of Market Power Issues Raised by Retail Competition on the Maine Electric Utility Industry* (Joint Report), prepared pursuant to P.L. 1997, ch. 447 (118th Legis. 1997) and also submitted on December 1, 1998 and made part of the record. The Joint Report noted the potential for an adversely high level of market power in northern Maine, arising because:

The market is dominated by the New Brunswick Power Corporation (NBP), which controls transmission access to northern Maine. NBP transmission is unsupervised by any regulatory authority, and NBP has set discriminatory rates with the result that it has preferential access to the market. This transmission regime effectively excludes Hydro-Quebec

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<sup>2</sup> We do not describe that explanation in this Order because it contains confidential bid information.

from the market as well as participants from New England and Nova Scotia.

Joint Report at 59. The Joint Report also cites a transmission constraint and the lack of access to a well designed spot market as factors which aggravate the market power problems.

Presented with these conclusions, the Joint Report opined that “the question of whether retail choice in northern Maine should be postponed must be confronted.” *Id.* The Report concluded, however, that “postponement should be a last resort” and that “[o]ther, less drastic remedies . . . should be implemented in the first instance.” *Id.*

The Joint Report suggested that, until the Province of New Brunswick regulates New Brunswick Power Corporation's (NBP or NB Power) transmission tariff, the northern Maine T&D utilities should contract with NBP for tie-line interruption service and needed ancillary services. The Joint Report also suggested NBP should offer to contract with the T&Ds to provide transmission services at a fixed rate. Preferably, the agreed price should be equal to NBP's lower “out” rate, rather than its higher “through” rate. Joint Report at 77. According to the Joint Report, the effect of such contracts should be to give any party interested in marketing power in northern Maine the ability to do so on the basis of non-firm imports over the MEPCO line backed by NBP's “tie-line interruption service” together with needed ancillary services. These contracts “would effectively remove the south-to-north constraint on the MEPCO line, and significantly improve northern Maine's access to generators in New England.” *Id.* at 74. These contracts might also permit the “beneficial influence of New England spot market pricing to be felt in northern Maine.” *Id.* at 80.

To facilitate a contractual agreement that would mitigate market power problems, the Commission invited the affected and interested parties to meet to discuss the matter: NB Power, the Maine utilities connected to the New England grid only through NB Power (MPS, HWC, Eastern Maine Electric Cooperative, Inc. and Van Buren Light and Power District, collectively referred to as the “northern Maine utilities), the OPA and Hydro-Quebec. As a direct result of the meeting of those parties at the Commission on December 17 and 18, 1998, NBP and the northern Maine utilities have negotiated a Products and Services Agreement, filed on February 22, 1999.

Under the Products and Services Agreement, NB Power agrees to supply: (1) tie-line interruption service, on a firm or non-firm basis, to any northern Maine utility requiring it; (2) ancillary services to any northern Maine utility; (3) transmission services through New Brunswick to any northern Maine utility at a fixed rate equal to the current “out” rate, which rate can be increased only by authorization of the proper New Brunswick regulatory authority; and (4) bona fide offers of energy and capacity and other electrical products and services to any customer of any northern Maine utility. Items (1) and (2) shall be available for a price equal to NB Power's actual cost plus a reasonable contribution to NB Power's fixed costs. The Agreement continues in effect unless canceled by all the parties or by this Commission. All aspects of the Agreement

are subject to impartial arbitration in case of dispute. The Agreement contemplates that the northern Maine utilities will transfer these services at cost to competitive electricity providers.

After the northern Maine utilities entered into the Products and Services Agreement, MPS, HWC and the OPA filed a Partial Stipulation in this proceeding. The stipulating parties agree that the Products and Services Agreement represents an acceptable mitigation of the market power problems identified by the two Commission Reports. The stipulating parties further agree that access to northern Maine's electrical markets exclusively through NB Power's transmission system and over the MEPCO line is no longer a substantial barrier to the development of an adequate retail market for electricity in northern Maine. The stipulating parties therefore agreed that market power issues do not prevent the Commission from approving the proposed sale of MPS's generation assets to WPS.

McCain is the only party not to join the stipulation. In comments, McCain states that it does not object to approval of the stipulation, "provided such approval properly describes the remaining need for actual interconnection of northern Maine to the electric grid of the United States and contains certain conditions to achieve that objective . . . ." In McCain's view, the arrangements made in the Products and Services Agreement should be viewed as transitional. The transitional, contractual mitigation of NB Power's market power is acceptable to McCain provided that the Commission's order expressly recognizes the "interim and transitional nature" of the Products and Service Agreement; that MPS and the other northern Maine utilities "continue to be obligated in good faith, to cooperate in efforts of the Commission ... to secure a permanent transmission access to northern Maine"; that MPS "shall be obligated to seek a resolution to the current absence of transmission access" to the rest of the New England; and last, that MPS be required to set aside \$1 million of the asset sale proceeds "to fund the exploration and development of a resolution of the absence of transmission access to northern Maine."

We agree that the Products and Services Agreement between NB Power and the northern Maine utilities mitigates market power concerns to a significant extent and, as a result, it is reasonable to allow the sale of MPS assets. We therefore need not decide whether MPS should be authorized to sell its generation assets in the absence of remedies provided by the Products and Services Agreement. We note that this particular sale of assets does not increase market concentration. Without the Products and Services Agreement, the issue would have come down to whether the retention of Tinker Station in order to hedge against future market power-driven price increases would have outweighed the benefits of reduced stranded costs from the sale of Tinker. Although the Power and Services Agreement does not eliminate all market power potential, we agree with the stipulating parties that the mitigating effect of the agreement removes the need to consider the retention of Tinker as a hedge against market power. Therefore, the sale to WPS is in the public interest.

We do not believe that the public interest requires the conditions sought by McCain, at least in the form advocated by McCain. As filed, the Product and Services Agreement terminates only with the consent of parties to the Agreement or by Order of the Commission. We are not certain of the other solutions that make the Agreement “interim and transitional” and therefore see no advantage to labeling the Agreement as such. We do agree, however, that the situation in northern Maine is developing and that consideration of a direct transmission link to the rest of New England at some point in the future may be appropriate. We note that the northern Maine T&D utilities will retain a public utility obligation to assure that reasonable transmission access is available so that power can be safely and economically delivered to their customers. McCain has apparently decided that an MPS transmission connection to the New England grid is the only permanent solution to NB Power’s market power. While we agree that the Product and Services Agreement may not solve all potential market power problems, and that a transmission connection to MPS may warrant further study, we are not prepared to require MPS to set aside \$1 million to study transmission access. At the time further study or construction is found to be appropriate, funding sources (either through utilities or otherwise) will be determined.

MPS requests the Commission to issue Exempt Wholesale Generator (EWG) findings with the Order Approving the Sale of Assets. WPS plans to file applications for EWG determinations with the FERC. Because the facilities to be sold were reflected in rates on October 24, 1992, under federal law, the Maine Commission must certify that allowing the facilities to be eligible: (1) will benefit consumers; (2) is in the public interest; and (3) does not violate Maine law.

We have concluded that the transfer of the assets to WPS is in the public interest. Consumers will benefit by the implementation of the Legislature’s requirements of separation of generation from transmission and distribution, as well as by the reduction in stranded costs. The assets are transferred because of state law, obviously not in violation of state law. Because state law separates generation from transmission and distribution and will remove generators from the definition of electric utility, allowing the transferred facilities to be eligible facilities: (1) will benefit consumers; (2) is in the public interest; and (3) does not violate Maine law.

During its 1998 session, the Maine Legislature passed a law authorizing utilities to convey their generation-asset-related rights, privileges and immunities which are required to be divested. The new law, codified at 35-A M.R.S.A. § 3204(8), authorizes the transfer of generation-asset-related rights, privileges and immunities, but only after (1) the utility provides to the Commission a copy of the law granting the rights and a description of the proposed transfer and (2) the Commission specifically finds that the law grants rights, privileges or immunities that are generation assets required to be divested or that are necessary to the ownership or operation of generation assets required to be divested. On August 7, 1998, MPS provided a copy of laws that grant to MPS (or its predecessors) the rights, privileges or immunities that MPS believes are generation-asset-related and that MPS proposes to transfer to WPS.

The Gould Electric Company obtained authorization from the Maine Legislature to store water and construct dams in certain waters in the State of Maine. P.&S.L. 1921, ch. 111. This authority was transferred to MPS, which was also thereby authorized to develop water power on the Aroostook River. P.&S.L. 1949, ch. 78. The rights and privileges granted under these Laws are necessary to the ownership of the Millinocket Lake Storage Dam and the Squa Pan Dam since they provide a legal authority for the construction, operation and/or ownership of these properties. The Commission finds that these statutory rights are necessary to the ownership or operation of generating assets being sold by MPS to WPS.

Accordingly, we

### O R D E R

That the sale of Maine Public Service Company's assets to WPS Power Development, Inc., pursuant to the Asset Purchase Agreement entered into on July 7, 1998 between Maine Public Service Company and WPS Power Development, Inc., is authorized.

Dated at Augusta, Maine, this 5th day of April, 1999.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      WELCH  
   NUGENT  
   DIAMOND

This document has been designated for publication.

### NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its



decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 6(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.